

March 13, 1950

Carl Betz, Actuary
Arizona Corporation Commission
Division of Insurance
The Capitol
Phoenix, Arizona

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ARIZONA ATTORNEY GENERAL

Dear Mr. Betz:

Your letter of March 2, 1950 asks our opinion as to the legality of a resolution by the Board of Directors of the Hospital Benefit Association which reads as follows:

"RESOLVED that the Hospital Benefit Association transfer Twenty-five Thousand Dollars (\$25,000.00) from the expense fund as a temporary advance to the morbidity fund with the understanding that this amount may at a later date be transferred back to the expense fund when the morbidity fund is sufficient to permit such transfer; that a copy of this resolution be submitted to the Commissioner of Insurance for his approval and upon receipt of such approval, the foregoing transfer be made and shown upon the records of the Association as of December, 1949, and included in the annual report of the Association to the Arizona Corporation Commission for the year 1949."

As you point out in your letter, the validity of said resolution hinges upon the question of whether the \$25,000.00, having been placed in the mortuary fund, can be removed to the operating expense fund.

The legislature made it mandatory that a benefit insurance corporation set aside certain amounts for the protection of members. The situation in which the minimum contributions to such fund are not deemed by the corporation to be sufficient for the protection of its members was provided for as follows:

"Each corporation shall create and maintain a mortuary fund by setting aside out of each premium and assessment collected by it, the sum of: * * * 5. Such other amounts of each premium collected as the corporation may deem necessary for the protection of its members. * * * " (Section 61-1009 ACA 1939, paragraph (a).)

The use of the word "shall" indicates that the provision was intended to be mandatory. This intention is further emphasized by the sentence following that quoted above:

"The residue of all stipulated premiums collected, after setting aside the mortuary fund as provided herein may be used for the general operating expenses of the corporation." (Emphasis supplied)

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Therefore, if the corporation considers the mortuary fund insufficient for the protection of its members, it must set aside such other amounts of each premium collected as it deems necessary for such protection.

Once such amount has been so set aside, it is our opinion that it becomes part of the mortuary fund.

The legislature definitely limited the uses to which mortuary fund assets may be put in the words following:

"61-1009. Funds. * * * The mortuary fund shall be used exclusively for the fulfillment of the policy contract and for no other purpose, but any part thereof may be deposited with the state treasurer and be invested as provided herein. Any part of the mortuary fund not deposited with the state treasurer may be invested in securities as provided herein.

(c) During any calendar year should the contributions to the mortuary fund exceed the amount required to pay all benefit claims arising during the same calendar year, the company may, in accordance with a provision in the certificate, make a refund to the certificate holders not to exceed fifty (50) per cent of the amount contributed by the certificate holder to the fund."

It is therefore our opinion that, once any money is placed in the mortuary fund of a benefit insurance corporation, it cannot be removed and deposited in an operating expense fund.

Trusting this answers your question satisfactorily, we are

Very truly yours,

FRED O. WILSON
Attorney General

WILBERT E. DOLPH, JR.
Assistant Attorney General

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